Supreme Court, U.S.
FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

CASE NO. 88-5986

IN THE UNITED STATES SUPREME COURT

October Term, 1988

CLYDE OSBORNE, APPELLANT

-vs-

STATE OF OHIO, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF OHIO
APPELLEE, STATE OF OHIO, MOTION TO DISMISS OR AFFIRM

S. Adele Shank
Ohio Public Defender Commission
8 East Long Street
Columbus, Ohio 43266-0587

John Quigley
David Goldberger
Ohio State University
College of Law
Clinical Programs
1659 N. High St.
Columbus, Ohio 43210

Counsel for Appellant

Ronald J. O'Brien
Columbus City Attorney
City Hall
90 West Broad Street
Columbus, Ohio 43215
(614)222-7385

Counsel for Appellee

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment and Stanley v. Georgia 394 U.S. 557 (1969) prohibit the State of Ohio from criminalizing the possession of child pornography in the privacy of the home?
2. Do the First and Fourteenth Amendments require a state to provide for a more culpable mental state than that of recklessness when prohibiting the possession of child pornography?
3. Did the authoritative construction of the child pornography statute by the Ohio Supreme Court violate Appellant's Fourteenth Amendment right to due process?
4. Is the use of hearsay information in an Affidavit in Support of a Search Warrant prohibited by the Fourth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	1
JURISDICTION	2
FACTS	3
ARGUMENT	
I. VAGUENESS AND OVERBREADTH	6
II. THERE IS NO FIRST AMENDMENT RIGHT TO PRIVATELY POSSESS CHILD PORNOGRAPHY	8
III. SCIENTER	10
IV. SEARCH WARRANT	11
V. AUTHENTICATION OF PHOTOGRAPHS	12
VI. RETROACTIVITY	13
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

	Page
CASES CITED:	
Commonwealth of Massachusetts v. Oakes 518 NE 2d 836 (1988), cert granted ____ U.S. ____ , U.S. Supreme Court Case No. 87-1651....	5
Cox v. New Hampshire 312 U.S. 569 (1984).....	13
Eastman v. Ohio 131 Ohio St. 1 (1936).....	7
Evergee v. Illinois 522 NE 2d 1200 (Illinois Sup. Ct. 1988), Appeal Dismissed 44 Crim. Law Rptr. 4061.....	10
Fullmer v. Utah, Case No. 83-5320, 464 U.S. 910 (1983).....	10
Illinois v. Gates 462 U.S. 213 (1983).....	11
Jones v. United States 362 U.S. 257 (1960).....	11
Miller v. California 413 U.S. 15 (1973).....	7,13
New York v. Ferber 458 U.S. 747 (1982).....	6,9,10,13
New York v. P.J. Video 475 U.S. 868 (1986).....	11
Stanley v. Georgia 394 U.S. 557 (1969).....	1,8
State v. Jordan 665 P.2d 1280 (Utah Sup. Ct. 1983, Appeal Dismissed sub nom.....	10
United States v. Fiorella 468 F. 2d 688 (Second Cir. 1972).....	11
United States v. Leon 468 U.S. 897 (1984).....	12
United States v. Nemuras 567 F. Supp. 87 (D. Maryland 1983), affirmed 740 F. 2d 286 (4th Cir. 1984).....	7
Ward v. Illinois 431 U.S. 767 (1977).....	7,13
Other Authorities Cited:	
18 U.S.C. § 2251, et seq.....	7
18 U.S.C. § 2252(2)(E).....	7
18 U.S.C. § 2253.....	7
28 U.S.C. § 1257(2).....	2
Ohio Revised Code	
Section 2901.21(B).....	10,13
Section 2901.22(C).....	10,13
Chapter 2907.....	6
Section 2907.01(I).....	7
Section 2907.323(A)(3).....	2,4,8,10, 11,13
Webster's Collegiate Dictionary Page 727 (G. and C. Merriam Company, 1981).....	8

JURISDICTION

The Appellant asserts jurisdiction under 28 U.S.C. § 1257(2) because he claims that Section 2907.323(A)(3), Ohio Revised Code, is repugnant to the United States Constitution, where the decision in this case by the Ohio Supreme Court was in favor of the validity of the Ohio statute.

As set forth herein, the Ohio statute, either on its face as authoritatively construed or as applied, does not violate the Constitution and for that reason the appeal should be dismissed or summarily affirmed because a substantial federal question is not presented for review.

FACTS

In June, 1985, United States postal inspectors began an investigation of Century Twentieth Studios in Holiday, Florida, regarding the use of the United States mails to transmit child pornography.

As a result of that investigation, postal inspectors had correspondence with Jack S. Smith, a principal in Century Twentieth Studios. Smith and a postal inspector had correspondence through the mails and Smith offered the postal inspector various photographs depicting sexually explicit activity between adults and minors. In one such item of correspondence Smith wrote to the postal inspector that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend of his in Ohio. Subsequently, a test letter was addressed and delivered to a post office box holder in Holiday, Florida, in which the postal inspectors ordered and paid for child pornography. Pursuant to that order Smith deposited in the U.S. mails an envelope that contained twenty color photographs of minors engaging in sexually explicit conduct.

As a result of this investigation on July 19, 1985, postal inspectors executed a federal search warrant on the premises of Jack S. Smith and Daniel S. Knous in the State of Florida, seized thousands of photographs which depicted minors engaging in sexual conduct, as well as other books and records. Smith and Knous were arrested on federal charges.

After his arrest, Smith advised Postal Inspector Witouski that photographic negatives of child pornography were in the possession of a friend of his in Ohio named Clyde. Knous, after his arrest, advised Postal Inspector Witouski that the child pornography negatives were in the possession of an associate of Smith's named Clyde Osborne, who resided in Columbus, Ohio.

During the execution of the federal search warrant in Florida, mailing lists were seized. Included on one such mailing list that was seized by the postal inspectors was the name of Clyde Osborne, 793 North Park Street, No. 3, Columbus, Ohio, 43215. When Postal Inspector Witouski reviewed the evidence seized from the federal search warrant on July 22, 1985 he located among that evidence a cancelled, personal check, authored by Jack S. Smith and made payable to Clyde Osborne in the amount of $3.50 (Three dollars and 50/100), dated June 3, 1985. The reverse side of the cancelled check disclosed that

the address of 793 North Park Street, No. 3, Columbus, Ohio, 43215 was inscribed thereon, and that said check had been cashed at Christie's Market, 680 North High Street, Columbus, Ohio, which is within several blocks of Osborne's address on Park Street.

Postal Inspector Witouski notified U.S. Postal Inspector Paul Hartman, Cleveland, Ohio, who related all of the above information to Detective James A. Phillips, Columbus Police Department, Child Pornography Task Force.

Detective Phillips applied for and obtained a search warrant based on the above information to search the premises of Clyde Osborne at 793 North Park Street, No. 3, Columbus, Ohio, 43215 for child pornography. A copy of the search warrant is attached to Appellant's Jurisdictional Statement filed in this Court.

Among the items seized from Osborne's home were four Polaroid color photographs of a young male white who was not only in a state of nudity but posing in such photographs in a lewd and lascivious manner with a graphic focus on the boy's private parts. The photographs were marked on the back with a notation "Tommy – 13". (R.53). When Osborne was interviewed after his arrest by Detective Phillips he stated that at the time the photograph was taken that the boy depicted therein was fourteen years of age. (R.54).

Osborne was charged by criminal complaint in the Franklin County Municipal Court with a violation of Section 2907.323(A)(3), Ohio Revised Code, in that he possessed child pornography in the form of the nude photographs described herein.

Osborne entered a not guilty plea and demanded a trial by jury. The State called two police detectives as witnesses and introduced the four photographs into evidence. After testimony by the defendant the case was submitted to the jury. The jury found Osborne guilty of violating Section 2907.323(A)(3), Ohio Revised Code.

The intermediate Ohio Court of Appeals affirmed Osborne's conviction and the Ohio Supreme Court, in a joint opinion involving another defendant in a similar case named Denis Young, upheld the conviction. Osborne had challenged the Ohio statute on grounds of vagueness, overbreadth, and First Amendment rights of speech and privacy; the validity of the search warrant; and the use of the photographs which were the subject of the charge as evidence in the trial of the case. In affirming the conviction, the Ohio

Supreme Court authoritatively construed the Ohio statute and found that it was not vague, overbroad, and there was no right to possess child pornography in the privacy of one's home. The search warrant was also upheld.

Osborne has filed a notice of appeal to the United States Supreme Court and it is before this court on Osborne's jurisdictional statement.

Many of the issues raised by Osborne in this case are the same as those raised in the case of Commonwealth of Massachusetts v. Oakes 518 NE 2d 836 (1988), cert granted _____ U.S. _____, U.S. Supreme Court Case No. 87-1651, currently scheduled for oral argument before the Court on January 17, 1989.

ARGUMENT

I. VAGUENESS AND OVERBREADTH

In combatting the nationwide problem regarding child pornography which was described by this Court in New York v. Ferber 458 U.S. 747 (1982), the Ohio General Assembly adopted a series of statutes in Chapter 2907, Ohio Revised Code, to address the production, distribution, and possession of child pornography. One of those statutes was Section 2907.323, Ohio Revised Code, which in pertinent part with respect to this case prohibits the possession of material or performance that shows a minor who is not the persons' child or ward in a state of nudity, unless within one of two statutory exceptions. As authoritatively construed by the Ohio Supreme Court, that statute is not vague nor overbroad and does not infringe upon an unspecified right to possess child pornography in the privacy of one's home.

The Ohio Supreme Court authoritatively construed the statute to apply to lewd exhibition of the genitals or graphic focus on the genitals, where a minor, defined as one below the age of 18, is depicted in that photograph. The statute itself, as recognized by the Ohio Supreme Court, provides affirmative defenses to possession of that type of material when possessed for bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by certain specified types or groups of individuals.

The authoritative construction by the Ohio Supreme Court of the Ohio statute is consistent with this court's decision in New York v. Ferber, supra where a New York statute prohibited the use of a child in a sexual performance. Sexual performance was defined as any performance which included "sexual conduct", which term was defined to include the "lewd exhibition of the genitals". Thus, the sexual conduct that was prohibited involving minors in the Ferber case included nudity if such nudity involved the lewd exhibition of the genitals. That was recognized by the Ohio Supreme Court in this case, and that Court authoritatively construed the Ohio statute consistent with this Court's viewpoint as expressed in Ferber. As was noted by this Court in Ferber, "the term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation." Ferber, supra at 765.

Like the Ferber court, the Ohio Supreme Court determined that the Ohio statute was not substantially overbroad by including lewd exhibition of the genitals within its reach, and whatever overbreadth may exist can be cured through a case by case analysis.

The Ohio Supreme Court's opinion is consistent with the interpretation of the federal child pornography statutes. See 18 U.S.C. Section 2251 et seq. "Sexually explicit conduct" under former 18 U.S.C. 2253 was defined to include "lewd exhibition of the genitals or pubic area of any person" when applicable to minors. Relying upon Ferber, the application of the federal child pornography law has been upheld with respect to nude photographs of minors when challenged as vague and overbroad. United States v. Nemuras 567 F. Supp. 87 (D. Maryland 1983), affirmed 740 F. 2d 286 (4th Cir. 1984). As noted by the Court in Nemuras, the word "lewd" has a generally well-recognized meaning, connoting sexual suggestiveness, and found that the photographs therein met that definition. The federal statute has since been amended to redefine "sexually explicit conduct" as "lascivious exhibition of the genitals or pubic area of any person" as applied to minors. 18 U.S.C. Section 2252(2)(E). The Ohio Supreme Court's interpretation of the statute in question by limiting its application to a lewd exhibition of the genitals or a graphic focus on the genitals is neither overbroad nor vague, is consistent with this Court's Ferber decision, and does not raise a substantial federal constitutional question. It was just such a vagueness and overbreadth argument that caused this Court in Ward v. Illinois 431 U.S. 767 (1977) to uphold a facially overbroad state obscenity statute that had been "narrowed" by an "authoritative construction" of a state's highest court in light of the decision and guidelines in Miller v. California 413 U.S. 15 (1973). The Ohio Supreme Court did nothing more in this case.

Osborne's second complaint about the statute is that it is vague because the term "minor" was not specifically defined, and the Ohio Supreme Court has construed this term to mean those below the age of 18.

It is well established that a legislative body need not define every word it uses in a statute. Under Ohio law, any term left undefined by statute is to be accorded its common, every day meaning. See Section 1.42, Ohio Revised Code and Eastman v. Ohio 131 Ohio St. 1 (1936). The common, ordinary meaning, together with an Ohio Revised Code definition of both juvenile and minor, are not likely to confuse a person of ordinary intelligence who is seeking fair warning of what conduct is proscribed. The term "juvenile" is defined in Section 2907.01(I), Ohio Revised Code, to mean an unmarried person under the age of 18. More importantly, with respect to this case, Section 1339(31)(K), Ohio Revised Code, specifically defines the term "minor" to mean a person

who has not attained the age of 18 years. That is the common and ordinary meaning of the term minor. The dictionary definition is one who has not yet reached the age of majority. Webster's Collegiate Dictionary page 727 (G. and C. Merriam Company, 1981). For purposes of voting, the United States Constitution, 26th Amendment, defines the age of majority as 18.

Based upon the above, it should have been clear to Osborne and others, that the term minor, by its dictionary definition, its ordinary and common everyday usage, and reference to the statutory definition of both juvenile and minor in the Ohio Revised Code, that its meaning was one who had not yet obtained the age of 18. Given the above, to no one's surprise, the Ohio Supreme Court authoritatively construed Section 2907.323, Ohio Revised Code, to apply to those under the age of 18. That authoritative construction, in the absence of a specific definition in Section 2907.323, Ohio Revised Code, renders the statute neither vague nor overbroad, nor does such construction retroactively attempt to take advantage of Osborne.

With respect to overbreadth, the Ohio Supreme Court reviewed the statutory scheme adopted by the State of Ohio with respect to child pornography and concluded that it punished conduct not pure speech, and the affirmative defenses set forth in this statute regarding appropriate purposes to possess such material narrowed the scope of the reach of that statute, and when so narrowed, was not overbroad.

II. THERE IS NO FIRST AMENDMENT RIGHT TO PRIVATELY POSSESS CHILD PORNOGRAPHY.

Osborne claims in this Court that Section 2907.323, Ohio Revised Code, is an unconstitutional violation of his First and Fourteenth Amendment rights of free speech and privacy because the possessory offense permits punishment for mere private possession in one's own home of child pornography. This claim is based upon Stanley v. Georgia 394 U.S. 557 (1969), which held that the mere private possession of obscene material in one's home was not permitted under the First and Fourteenth Amendments.

The State of Ohio contends that the First Amendment is not absolute and that there are compelling reasons which justify the State in distinguishing between child pornography and obscene material for First Amendment purposes under Stanley. A state is not foreclosed from criminalizing conduct merely because it occurs within the confines

of the home. Stanley itself acknowledges that the decision did not infringe upon the power of the state to make possession of other items, such as narcotics, firearms or stolen goods, a crime merely because the offense happened with the confines of the home. See Stanley, supra at 568, Footnote 11.

The Stanley decision turned upon the Court's finding that the Georgia statute infringed fundamental liberties protected by the First and Fourteenth Amendments. The state contends that there is no fundamental right or liberty under our Constitution to possess material which depicts children engaging in sexual conduct or nude photographs which depict genitals in a lewd manner.

This Court's decision in New York v. Ferber 458 U.S. 747 (1982) has already made the distinction between obscene material and child pornography, where the conclusion was necessary that the states do not offend the First Amendment when they regulate child pornography which does not meet the definition of obscenity.

If Ferber means anything, it stands for the proposition that states may treat child pornography differently, and more strictly, that obscene material consistent with the First Amendment.

For the Appellant to prevail in this Court upon that issue it is necessary to conclude that there is a "fundamental right" to possess child pornography in the privacy of the home, which right is secured by a combination of the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution. Suffice it to say that such a right is not explicitly secured by an individual, or combination, of the above amendments. It is only when this Court concludes that such a fundamental right exists that Stanley would extend to Osborne the right to possess child pornography in the privacy of his own home. The fundamental rights which have been discovered in the Constitution that are not explicit therein have been characterized as those liberties that are deeply rooted in this nation's history and tradition, or those fundamental liberties that are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. The State of Ohio is confident that this Court is unwilling to find that the right to possess child pornography in the privacy of one's home is such a fundamental right.

However, even if this Court feels that there exists such a fundamental right in the Constitution to possess child pornography in the privacy of one's own home, then the state contends that there is a sufficiently compelling state interest which justifies the

subordination of that fundamental right to state regulation. This Court has held that the government may regulate First Amendment rights when there are extraordinary circumstances or other compelling governmental interests. In delivering the opinion of the Court in New York v. Ferber, at 749 and in Footnote No. 1 Justice White summarizes the problem which sufficiently establishes the state's substantial and compelling interest which would override any fundamental right this Court would grant to Osborne and others to privately possess child pornography. Those compelling reasons are the protection of our children from sexual exploitation, and the photographic memorialization of child sexual abuse.

Finally, with respect to this Stanley issue, Ohio would submit that two decisions of this Court have already adjudicated this issue by dismissals for want of a substantial federal constitutional question. See State v. Jordan 665 P.2d 1280 (Utah Sup. Ct. 1983, Appeal Dismissed sub nom., Fullmer v. Utah, Case No. 83-5320, 464 U.S. 910 (1983); Geever v. Illinois 522 NE 2d 1200 (Illinois Sup. Ct. 1988), Appeal Dismissed ___ U.S. 44 Crim. Law Rptr. 4061 (10-31-88).

III. SCIENTER

As the Court can see, Section 2907.323, Ohio Revised Code, does not explicitly or specifically provide a culpable mental state or scienter for the commission of the offense. As was noted by this Court in New York v. Ferber, supra at 765 "as with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." Ohio law, and the Ohio Supreme Court, has imposed "some element of scienter" with respect to Section 2907.323(A)(3), Ohio Revised Code.

Section 2901.21(B), Ohio Revised Code, provides that when the section defining a criminal offense does not specify a specific degree of mental culpability, that unless there is a plain indication to impose strict liability, then the mental state of "recklessness" is required for the person to be guilty of the offense. Recklessly is one of four mental states applicable in Ohio and is defined in Section 2901.22(C), Ohio Revised Code. The mental states, and degrees of culpability in Ohio, are purposely, knowingly, recklessly, and negligently.

Recklessness is defined in that statute as follows:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." (Emphasis Added.)

That definition, which both by statute and the Ohio Supreme Court decision in this case, are incorporated into Section 2907.323, Ohio Revised Code, provides "some element of scienter" which Ferber indicate is required in child pornography statutes. Since Ohio requires scienter, contrary to the assertions of Osborne, there is no substantial federal constitutional question.

IV. SEARCH WARRANT

The search warrant is attached to the Appellant's Jurisdictional Statement, and most of the substantial facts contained in that search warrant are set forth in the statement of facts presented by the State of Ohio herein. Both Ohio Rule 41 of Criminal Procedure and Federal Rule 41 of Criminal Procedure permit the use of hearsay in the affidavit in support of a search warrant application. As long ago as Jones v. United States 362 U.S. 257 (1960) this Court specifically held that hearsay was permissible in a search warrant application. Double hearsay has been specifically approved. United State v. Fiorella 468 F. 2d 688 (2nd Cir. 1972). The fact that this search warrant involved obscene material or child pornography does not require a higher level to be established than that applicable generally under the Fourth Amendment with respect to other criminal offenses in the establishment of probable cause. New York v. P.J. Video 475 U.S. 868 (1986).

The search warrant is to be measured by the totality of the circumstances test of Illinois v. Gates 462 U.S. 213 (1983), rather than the abandoned Aguilar-Spinelli two prong test, which the Appellant has cited in his brief.

When the Court looks to the totality of the circumstances test the information contained in the search warrant is more than adequate to comply with the Fourth Amendment. Smith and Knous' statements were declarations against penal interest which provided trustworthiness to the information which they supplied to the postal inspectors. The information concerned confederates and co-conspirators. From the time that

information was first supplied by the child pornography suspects in Florida, it remained in the law enforcement realm, although it was related to a Postal Inspector in Cleveland, who related it to the detective in Columbus. The State does not view this information as "triple hearsay" as posited by Osborne, because the information was provided to law enforcement officers who had common knowledge and the same interest in enforcing the law. Thus, under the totality of the circumstances test, and considering that the name of Osborne was on the Florida child pornographer's mailing list together with the cancelled check, the information was sufficient to support the search warrant. Finally, there is no indication that the officers, even if that information was insufficient, were not acting in good faith in executing the search warrant and the evidence would have been admissible in any event under United States v. Leon 468 U.S. 897 (1984).

V. AUTHENTICATION OF PHOTOGRAPHS

Throughout this case the Appellant has claimed there was a lack of a foundation to support the admissibility of properly authenticated photographs. The state has never quite understood how this should be accomplished. Would the Appellant Osborne require the state to produce the person who took the photograph to testify that it is a "true and accurate representation of the young man at the time the photograph was taken"? If that type of requirement is imposed, no child pornography case could be successfully prosecuted.

The State had sufficient evidence before the trial court, and in the record, to justify the admission of the photographs, in addition to establishing that a minor was depicted therein. As noted in the Statement of Facts, and conveniently omitted by Appellant in his Jurisdictional Statement, in addition to the photographs themselves there was an admission by Osborne that the party in the photograph was fourteen, and there were notations on the back of the photograph that the person depicted therein was Tommy, at age 13.

The Constitution of this country certainly requires no more authentication of a photograph to be admissible in a child pornography case than what was presented to the trial court herein. Therefore, there is no substantial federal constitutional question warranting the exercise of this Court's jurisdiction with respect to that issue.

VI. RETROACTIVITY

Appellant apparently claims that because the Ohio Supreme Court provided an authoritative construction of Section 2907.323, Ohio Revised Code, that his conviction should be set aside. As was noted with respect to the issues of overbreadth and vagueness, some of the retroactivity issues raised by Osborne are neither present in this case nor a basis to result in the setting aside of the conviction. For example, one such reason is the alleged retroactive application of the term minor to mean a person under 18 years of age for purposes of this statute. However, it is clear as noted with respect to vagueness that that common everyday meaning accorded to the term minor was not vague, and its specific construction by the Ohio Supreme Court to state that a minor is one under 18 years of age, does not render a retroactive application to Osborne.

Contrary to Osborne's assertion that the Ohio Supreme Court "rewrote" the statute, the Court did nothing other than authoritatively construe the statute to be consistent with New York v. Ferber. The Ohio Supreme Court did not add additional elements to the offense as the Appellant claims, but merely construed existing elements.

The Ohio Supreme Court did not insert the culpable mental state of recklessness, that provision was already in existence by virtue of Sections 2901.21 and 2901.22, Ohio Revised Code. Moreover, as noted by Justice Douglas in the Ohio Supreme Court Opinion, Osborne did not object to the jury instructions provided in this case regarding that issue, and his proposed jury instructions were completely silent on the element of scienter.

The narrowing and authoritative construction provided by the Ohio Supreme Court in this case is no different than many state courts were required to do with respect to obscenity statutes after this Court's decision in Miller v. California 413 U.S. 15 (1973). As noted above, when the Illinois Supreme Court did such an authoritative construction, this Court not only approved that construction but upheld the conviction in Ward v. Illinois, supra. See also Cox v. New Hampshire 312 U.S. 569 (1941) where, like this case, the Legislative intent was clear and the narrowing construction foreseeable, and the conviction was upheld by this Court when the authoritative construction post-dated the suspects conduct.

The cases cited by the Appellant with respect to this retroactivity issue all concern "pure speech" and not possessory offenses involving conduct. For that reason, there certainly are no retroactive application issues that warrant review by this Court due to the authoritative construction of the Ohio statute by its Supreme Court.

CONCLUSION

Based upon the foregoing law and argument, the State of Ohio respectfully submits that the Appellant Osborne has not shown that his child pornography conviction is repugnant to the United States Constitution, or any provision thereof, and this Court should either dismiss or summarily affirm this appeal.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW

Ronald J. O'Brien
City Attorney
City Hall, 90 West Broad Street
Columbus, Ohio 43215
Phone: (614) 222-7385

Attorney for Appellee

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Appellee, State of Ohio was sent by regular U.S. Mail, postage prepaid, to S. Adele Shank, Ohio Public Defender Commission, 8 East Long St., Columbus, Ohio, 43266-0587 and John Quigley and David Goldberger, Ohio State University College of Law, Clinical Programs, 1659 N. High St., Columbus, Ohio, 43210, attorneys for Appellant this 12th day of December, 1988.

Ronald J. O'Brien
City Attorney

1439L